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HAROLD B. WILLEY,

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 695

NATIONAL UNION OF MARINE COOKS AND STEWARDS and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,

Petitioners,

vs.

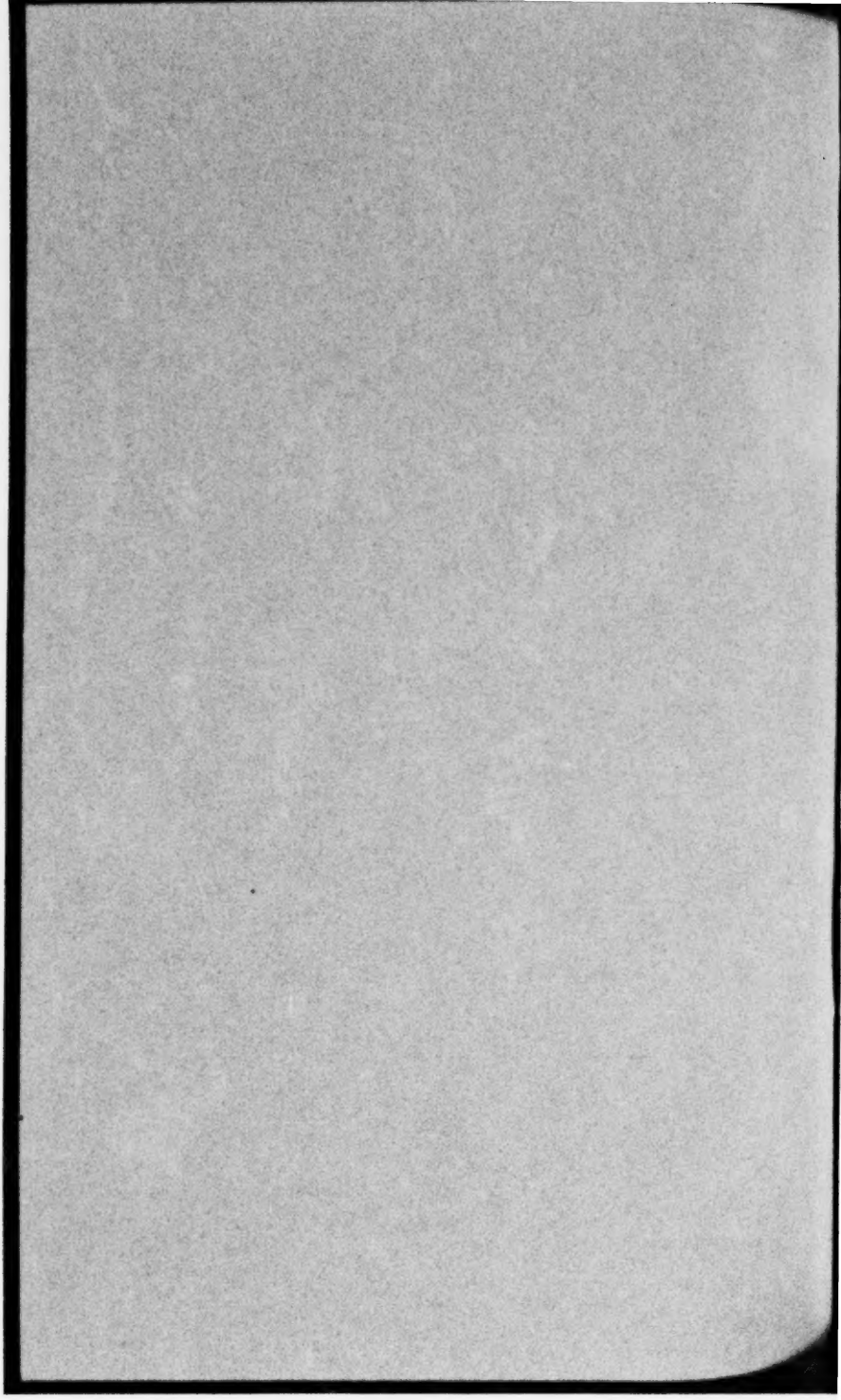
NATIONAL LABOR RELATIONS BOARD, PACIFIC AMERICAN SHIPOWNERS ASSOCIATION; ALASKA STEAMSHIP COMPANY, AMERICAN MAIL LINE, LTD., POPE & TALBOT, INC., and SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,

Respondents.

REPLY MEMORANDUM FOR PETITIONERS.

NORMAN LEONARD,
240 Montgomery Street, San Francisco 4, California,
Attorney for Petitioners.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
240 Montgomery Street, San Francisco 4, California,
Of Counsel.



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The Board's Brief In Opposition consists primarily of a "plea in confession and avoidance"; confession,

by silence, that unless restrained by judicial authority it will proceed to certify a union with "membership policies which discriminate against Negroes" (Br. in Opp. p. 5); and avoidance by suggesting that since *in the ordinary case* a representation proceeding is immune from judicial review, this one should be also (Br. in Opp. pp. 7-10).

But as the Petition demonstrates, there are significant factors which take this case out of the category of an ordinary representation proceeding.

1. The Board's proposed certification is directly contrary to the national public policy against racial discrimination. Nowhere in its Opposition does the Board challenge this fact. It does not even consider the Court's decisions in the analogous cases under the Railway Labor Act (*Steele v. Louisville & Nashville RR. Co.,* 323 U.S. 192; *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768), or its application of the principles there laid down to bargaining representatives under the National Labor Relations Act (*Ford Motor Co. v. Huffman,* 345 U.S. 333) (See Petition for Certiorari, pp. 22-23).

Nowhere does the Board deny that its certification would clothe the offending union with semi-governmental powers (Petition p. 18), and it does not even consider how such conduct on its part can be squared with the national policy against racial discrimination.

2. The Board here is bound by a Court of Appeals decree. This makes the situation totally unlike that presented in the cases upon which it now relies (Br.

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in Opp. pp. 7-8). For here what is involved is the enforcement of a court decree, not a mere review of an administrative determination. While Judge Pope expressed doubts as to the power of the Board to bind itself to the terms of the Consent Decree (218 F. 2d at 916), the fact is that the Court of Appeals made the order in question and all parties (including the Board) are bound by it until it is set aside.[1] It is not disputed that the Court of Appeals had jurisdiction over both the subject matter and the parties when it entered the order. In those circumstances there is "impressive authority for the proposition that [the] order . . . must be obeyed by the parties until it is reversed by orderly and proper proceedings" (*United States v. United Mine Workers of America*, 330 U.S. 258, 293).[2] If this is so "without regard even for the constitutionality of the Act under which the order is issued" (ibid.), how much more so is it true here where all that is involved is a contention that the administrative agency had no statutory power to consent to the decree (Br. in Opp. p. 9).

3. In view of the fact that the court below has in effect abdicated its authority to enforce its own order,

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[1]It is not Petitioner's view that the Consent Decree forever bars the Board from making a different unit determination, as the Board erroneously contends (Br. in Opp. p. 9, note 7). If "cogent considerations" indicate the appropriateness of another unit, or if any material change of circumstance occurs, the Board is free to move for a modification of the decree.

[2]As the court below said in an analogous situation:

> "We feel constrained to observe that . . . the appropriate procedure for appellee to pursue as a public officer would have been to move for a modification or vacation of the injunction." (*Yanish v. Barber*, 211 F. 2d 467, 470 [CA 9]).

the cases cited in the Petition (pp. 12-17) respecting the exercise by Courts of Appeals of broad equity powers in the enforcement of Board orders, are not "inapposite", as suggested by the Board (Br. in Opp. p. 9, note 8), but on the contrary, are precisely in point. Also in point although totally ignored by the Board in its Opposition is the "All Writs" section, 28 USC §1651, which gives to the court below the very jurisdiction it has here refused to exercise.

Despite the Board's attempt to minimize the importance of the issues presented, their significance to (1) the administration of the National Labor Relations Act, (2) the scope of the jurisdiction of the court below, and (3) the relationship between the national policy against racial discrimination and the statutory authority of the Board, cannot be concealed.

To consider and resolve the issues thus presented, the writ sought should be issued.

Dated, San Francisco, California,
May 9, 1955.

Respectfully submitted,
NORMAN LEONARD,
Attorney for Petitioners.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
Of Counsel.

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